exactly parallel with *Stewart* v. *Lehigh Valley Rd.*, 38 N. J. Law 505; where a recovery was also allowed; but the two cases proceed in directions diametrically opposite; one that it is a valid contract in all instances, the other that it operates as a lowering of rates to all customers, and for that reason is valid: *Ex parte Benson*, 18 S. C. 38; s. c. 44 Am. Rep. 564.

In 1859, a case arose in Massachusetts concerning discriminating rates, in which it was held that a common carrier is not bound to transport goods for all persons at the same rates; but may give special rates to whomsoever it will, so long as its other customers, under exactly the same circumstances, are charged a reasonable rate: *Fitchburg Rd.* v. *Gage*, 12 Gray 393.

This study of the various cases necessarily shows much discrepancy in them. The remark of Justice CROMPTON, while often cited, is not followed in principle very often. While it is conceded that carriers may charge a reasonable price, and it is often said that the charging of one too little is not the charging of another too much, but only evidence of it; yet the courts are very much inclined, where all things are equal, to require the carrier to carry for all at the lowest rate he charges any one customer; and if he charges a greater rate, to compel him to refund. This is particularly true of the Ohio and New Jersey cases. So, in many of the English cases it is said that the interests of the carrier must always be considered in determining whether it has discriminated in favor of one to the injury of another; and three cases are cited in this country upon this point; but it must be obvious that this is true only in a limited sense. For a carrier may be charging all customers such a rate that he is only making a fair profit on the capital invested, and also charge a single customer, in order to favor him, a lower rate, or the cost of the transportation alone, or even below that, whereby the latter is peculiarly favored and enriched by being able to monopolize the trade, at the expense of his competitors in trade. In such an instance, to require the carrier to charge the favored customer the regular rates is obviously beyond the power of a court of chancery; and to compel it to carry for all at this favored rate is ruinous to it, and violative of the statement that the interests of the road must be always borne in mind. The real solution of this question, if the courts undertake at all to interfere, is, to compel the carrier to carry for all, at the same rate it carries for the favored customer; and if that is ruinous, the managers of the carrier company have only themselves to blame for having shown and given unfair rates to a customer. One price to all must be the motto, everything else equal; or, in other words, the *same profit* for the labor performed, must be made out of the carrying done for each individual.

W. W. THORNTON.

Crawfordsville, Ind.

Court of Chancery of New Jersey.

SEMON *v.* TERHUNE.

A mortgage recorded after the deed to the mortgagor, although it is dated before it, is notice to a subsequent purchaser from the mortgagor. The date may be due to a mistake, and the record is enough to put a prudent man on inquiry.

A mortgagor who pays the bond after the property has been sold under foreclosure and the proceeds of the land have become the primary fund for the payment, is entitled to subrogation, and the mortgage is not extinguished by the payment.

FINAL hearing on bill to foreclose and answer.

E. A. & W. T. Day, for complainant.

J. Garrick, for defendant.

The opinion of the court was delivered by

RUNYON, C.—This suit is brought to foreclose a mortgage dated and acknowledged September 17th 1880, and recorded on the 15th of October following, given by the defendants John G. Semon and wife to Richard M. Johnson, upon lands in Jersey City, to secure the payment of $750, and interest, according to the condition of Semon's bond to Johnson. The bill states that the mortgage was given for purchase-money on the sale of the mortgaged premises by Johnson to Semon, but the fact is not admitted by the answer. The deed to Semon was dated September 30th 1880, was acknowledged October 1st 1880, and recorded on the 24th of November following. The bill states that while the date of the mortgage is prior to that of the deed, the mortgage was not delivered until the time of the delivery of the deed; but this is not admitted by the answer. Johnson assigned the mortgage February 9th 1881, to James M. Connor, by assignment of that date, recorded February 16th 1881. On the 2d of June 1884, James M. Connor assigned it to James P. Connor, executor, &c., of Wil- C. Connor, deceased, and he assigned it September 4th 1884, to the complainant. When John G. Semon bought the property of Johnson it was incumbered by a mortgage for $1000, given September 10th 1886, by William Nattrass, who then owned the premises, to Jane C. Vreeland. That mortgage came to the hands of Jacob C. Terhune by assignment. He died June 15th 1882. His executors were the defendant John V. H. Terhune and Peter Schoonmaker. September 27th 1882, they filed a bill in this court to foreclose that mortgage. The only defendants to that suit were John G. Semon and his wife. There was a final decree in that suit by default. It was entered February 5th 1883, and the execution was issued thereon for the sale of mortgaged premises, which under it were sold May 3d 1883, to John V. H. Terhune for $500, and a deed therefor was given to him by the sheriff. He took possession under his deed, and has been in possession ever since. The bill asks that an account be had with him, and that the property be sold to pay in the first place to him the amount which may be found to be due to him in respect of the first mortgage, and then to pay the com-

plainant what may be found to be due to him on his mortgage, with costs, and that any balance of the proceeds of the sale be paid to Terhune. Terhune, by the answer, admits the making and recording of the complainant's mortgage, and states that the omission to make the holder thereof a party to the foreclosure suit upon the first mortgage was due to the fact that the record of the complainant's mortgage was indexed in a wrong place. The answer further alleges that in 1884 the then holder of the complainant's mortgage threatened to sue John G. Semon for the money due upon the bond, and that the latter then paid it, and took an assignment of the bond and mortgage to complainant, who has no interest in them, but holds them for the use and benefit of John G. Semon, and subject to his control. The complainant filed no replication, and the cause comes on for hearing upon bill and answers.

The foreclosure proceedings upon the first mortgage were a nullity as to the holders of the second mortgage. By his purchase at the sheriff's sale under them, Terhune obtained the title of the holders of the first mortgage, and the equity of redemption of John G. Semon and his wife, but that equity of redemption was subject to the payment of the second mortgage, if that mortgage was a valid lien, of which the purchaser at the sheriff's sale had notice, upon the property; and if that mortgage were such a lien, and Terhune had taken an assignment of it after his purchase, equity would not have permitted him to enforce payment from Semon of the bond which it was given to secure, without giving Semon the benefit of a resort to the proceeds of the sale of the premises after satisfying the first mortgage therefrom: *Vanderkemp* v. *Shelton*, 11 Paige 28. The only question on this point in this case is whether the purchaser had notice; that is, whether he had constructive notice from the records. Had he consulted the record (the index is no part of it), he would have discovered that the title to the mortgaged premises remained in Richard M. Johnson up to September 30th 1880, and that, by a deed of that date, Johnson conveyed them to John G. Semon, who, by a mortgage recorded after, although dated before that date, mortgaged them to Johnson. The fact that the mortgage bears date prior to the date of the deed would not, under the circumstances, have justified the purchaser in concluding that it was given before Semon acquired title, for it might have been due to a mistake in the date of the one instrument or the other. There was at least enough upon the record to put him as a prudent man upon

inquiry. He had notice of the mortgage from the record; for, in searching for mortgages by Semon from the date of his deed, September 30th 1880, he would have found the mortgage. The doctrine of the cases of *Losey* v. *Simpson*, 11 N. J. Eq. 246, and *Speilman* v. *Kleist*, 36 Id. 199, is not at variance with that now enunciated. The doctrine of those cases is that one who proposed to purchase land, or to take a mortgage upon it, is not bound to take notice of the record of a conveyance or mortgage made by one whose title deed has not been recorded, and the reason is that he has no clue to guide him in searching the record. But here the record showed the searcher the deed to Semon, and his mortgage to his grantor. The mortgage was indeed dated before the date of the deed, but it was recorded after the latter date, and the deed itself was on record. It is urged that, according to the record, it appears that after Semon gave the mortgage to Johnson, the latter conveyed the property to him by deed of a subsequent date, and so extinguished the mortgage; for, according to the dates of the instruments, Semon had no title when he mortgaged to Johnson, and, having no title, he mortgaged the property to the person who owned it. The inference from the condition of the record would be that there was some mistake in the dates, and that in fact Johnson conveyed to Semon and then Semon mortgaged to him; or that Semon mortgaged to Johnson before he acquired title, and, having acquired title, afterwards might be estopped from denying that the mortgage was valid. The record was notice of the mortgage. But it is urged that if Terhune is chargeable with notice, Semon is entitled to no relief, because, according to the answer which is to be taken as true upon this hearing, he himself paid off the bond, the payment of which the mortgage was given to secure, and the bond was his own. But if the land had, as between him and the purchaser at the foreclosure sale, become the primary fund for the payment of that mortgage, he is entitled to subrogation on paying it off (as he was compelled to do), because of his personal liability thereon. The value of the premises beyond what was necessary to pay the first mortgage was the primary fund to pay the second mortgage (*Vanderkemp* v. *Shelton*, *ubi supra*), and, under the circumstances, he is entitled to subrogation: *Stillman's Ex'rs.* v. *Stillman*, 21 N. J. Eq. 126; *Faulks* v. *Dimock*, 27 Id. 65; *Tice* v. *Annin*, 2 Johns. Ch. 125; *Jumel* v. *Jumel*, 7 Paige 591; *Russell* v. *Allen*, 10 Id. 249.

There will be a decree for an account by Terhune of the rents

and profits from the time of the delivery of the sheriff's deed to him, in which account he is to be allowed for lawful taxes and assessments paid by him, and for moneys paid for necessary repairs. Should there be a balance against him on such accounting, it is to be credited on the amount due upon the first mortgage. Should the balance be in his favor, he is to have it as well as the amount due to him in respect to the first mortgage raised and paid to him out of the proceeds of the sale of the mortgaged premises before paying the second mortgage therefrom. There will also be an account of what is due upon the first and second mortgages, and the property will be sold to raise and pay in the first place to Terhune, the amount found to be due upon the first mortgage, after crediting any balance of rents and profits which may be found against him; and if any balance is found in his favor, he is to have the amount of it paid to him, as before stated, out of the proceeds of sale before payment of the second mortgage. He is not to have the costs of the foreclosure proceedings upon the first mortgage, nor the execution costs in that case; *Van Duyne* v. *Shann*, 39 N. J. Eq. 6. There will then be paid to the complainant the amount found due upon the second mortgage, with the cost of this suit, and the surplus if any, will be paid to Terhune.

The right of subrogation is a creation of equity, and has no application to an action at law, as in ejectment: *Meyer* v. *Mintonye*, 106 Ill. 414. It is not formal or technical, but its object is essentially to promote justice. It cannot be invoked if inequitable to do so, or if there is unreasonable delay: *Gerrish* v. *Bragg*, 55 Vt. 329. In its early history it was applied only in favor of those who were bound by the original security with the principal debtor. As equitable rights developed, its application has been greatly extended, and, it may be stated generally, that it is now applied in favor of all persons who are required to pay the debt of another, for the protection of their own interests.

The most common instance, where the doctrine of subrogation is applied, is in the case of purchasers of the equity of redemption, with or without notice of existing liens. Thus, when a purchaser of land pays off a debt of his grantor secured by a deed of trust upon the premises as a part of the purchase-money, to protect his own property from sale, he will be subrogated to the lien of the deed of trust, as against an intervening lien of the grantor. Here the payment is not voluntary, as if made by a stranger, but is made by the purchaser to protect his own interest in the property. And in such case, a court of equity will keep alive the lien in his favor, notwithstanding it has been formally released without his knowledge and consent: *Hudson* v. *Dismukes*, 77 Va. 242, 247; *Gatewood* v. *Gatewood*, 75 Id. 407 and cases; *Young* v. *Morgan*, 89 Ill. 199, 203. See *Lynch* v. *Hancock*, 14 S. C. 66, 84; *McCormick* v. *Irwin*, 35 Penn. St. 111, 117; *Clark* v. *Mackin*, 95 N. Y. 346; s. c. 30 Hun (N. Y.) 411; *Barnes* v. *Mott*, 64 N. Y. 397; *Orrick* v. *Durham*, 89 Mo. 174, 179; *Bryson* v. *Close*, 60 Ia. 357.

A party who advances money to another that is used to discharge a valid pre-existing lien on real estate, if not a mere volunteer, is entitled, by subrogation, to all remedies which the original lienholder possessed as against the property: *Edwards* v. *Davenport*, 20 Fed. Rep. 756, 726. In *Cottrell's Appeal*, 23 Penn. St. 294, 295, A. obtained judgment against B. To prevent sale upon execution, B. gave A. his note, with C. as security; C. paid the note and obtained an assignment of the judgment from A., and claimed payment out of proceeds of sale of B.'s real estate upon judgment obtained by D. against B. subsequently to A.'s judgment: *Held*, that he was entitled to subrogation. The court stated the doctrine thus: "When one not a mere volunteer discharges the debt of another, he is entitled to all the remedies which the creditor possessed against the debtor. Actual payment discharges a judgment or other encumbrance at law, but where justice requires it we keep it afoot in equity for the safety of the paying securities."

In *Mosier's Appeal*, 56 Penn. St. 76, 80, numerous judgments were entered against two debtors, some joint and some several; executions were issued and the land held jointly levied on. The court ordered the undivided interest of one of the debtors to be sold separately. A junior judgment creditor, believing that the land would be sacrificed, after the execution plaintiffs had refused to assign their judgments to him on payment, paid the executions to the sheriff and satisfaction was entered. No other liens having intervened, he was subrogated to the rights of the execution plaintiffs, and the satisfaction cancelled. The court very clearly states the rule that subrogation "will not arise in favor of a stranger, but only in favor of a party who on some sort of compulsion discharges a demand against a common debtor. For instance, a surety who pays the debt of his principal, will be entitled to the security of the creditor; so, where one of several joint sureties has paid the whole debt, he will be entitled to the judgment to enforce contribution by his co-sureties. * * * The principles of subrogation do not apply in favor of a volunteer. * * * They can obtain the right of substitution only by contract. * * * I regard the doctrine as applicable in all cases where payment has been made under a legitimate and fair effort to protect the ascertained interests of the party paying, and when intervening rights are not legally jeopardized or defeated."

Stranger cannot invoke the doctrine of subrogation.—Courts uniformly recognise the rule that a mere stranger or volunteer, who, in the absence of agreement, pays a debt for which another is bound, and which he was under no obligations to pay, cannot invoke the doctrine of subrogation: *Hough* v. *Aetna Life Ins. Co.*, 57 Ill. 319; *Conrad* v. *Buck*, 21 W. Va. 396, 408; Dixon on Subrogation 163, 164, *et seq.* Thus, where one advances money to another to enable him therewith to make a loan to a third party on the security of an equitable mortgage, he is not entitled to subrogation, merely on the ground that he so advanced the money: *Van Winkle* v. *Williams*, 38 N. J. Eq. 105. Or where a third party, under no legal obligations, furnishes money to another to redeem from a judicial sale, where the advancement was not made under the belief or expectation that he would succeed to the rights of the party to whom it was so advanced, but under a belief that a mortgage would be executed to secure him, and contracted to that effect, the principles of subrogation will not apply. The party is simply considered as an intermeddler: *Wormer* v. *Waterloo Agr. Works*, 62 Iowa 699, 702.

In *Kitchell* v. *Mudgett*, 37 Mich. 81, 85, 86, a third party paid off and discharged the first two of three mortgages on certain real estate, and took a new mortgage for the amount paid. He was under no obligations to pay the mortgage

debt. It was held that his mortgage was subsequent to the one left unpaid, and that he was not entitled to be subrogated to the rights of the first two mortgagees.

Conventional subrogation arises by contract in favor of third persons, not parties to the original obligation; as where one furnishes money with an agreement that it shall be used in discharging a debt due for the purchase of land, and it is so used, with an understanding that he who advances it shall have the same remedies to recover the money thus loaned that the original vendor was entitled to for the enforcement of his demand, and the lender is subrogated to the rights of the vendor of the land: *Warhmund* v. *Merritt*, 60 Tex. 24, 27; see *Baldwin* v. *Moffett*, 94 N. Y. 82; *Seward* v. *Huntington*, 94 Id. 104.

In *Shinn* v. *Budd*, 14 N. J. Eq. 234, a third party paid off a mortgage on certain real estate and claimed subrogation. He was under no obligations to make payment, and it was made without agreement or understanding that he was to be substituted. His bill was denied. GREEN, Chancellor, observed (p. 236), "Subrogation as a matter of right as it exists in the civil law, from which the term has been borrowed and adopted in our own, is never applied to aid a mere volunteer. Legal subrogation into the rights of a creditor for the benefit of a third person, takes place only for his benefit, who being himself a creditor, satisfies the lien of a prior creditor, or for the benefit of a purchaser who extinguishes the incumbrance upon the estate, or of a co-obligor or security who discharges the debt or of an heir who pays the debts of the succession," citing Code Napoleon, book 3, lit. 3, art. 1251; Civil Code of La., art. 2157; 1 Pothier on Oblig., part 3, ch. 1, art. 6, § 6. "We are ignorant, says the Supreme Court of Louisiana, of any law which gives to the party who furnishes money for the payment of a debt the right of the creditor who is thus paid; the legal claim alone belongs not to all who pay a debt, but only to him, who, being bound for it, discharges it: *Nolte & Co.* v. *Their Creditors*, 7 Mar. (N. S.) 602; *Curtis* v. *Kitchen*, 8 Id. 706; *Cox* v. *Baldwin*, 1 Miller, St. Louis R. 147. The principles of legal subrogation as adapted to and applied in our system of equity, has, it is believed, been rigidly restrained within these limits."

In *The Bank of the U. S.* v. *Winston's Executors*, 2 Brocken. Rep. 254, C. J. MARSHALL said: "If a security not assignable be discharged by a surety, whom it binds, equity keeps it in force in his favor and puts such surety in place of the original creditor. But I think there is no case in which this has been done in favor of a person, not bound by the original security, who discharges the debt as a volunteer."

In *Gadsden* v. *Brown*, 1 Speer's Eq. 37 (S. C.), JOHNSON, Chancellor, said: "The doctrine of subrogation is a pure unmixed equity, and from its very nature could not have been intended for the relief of those who were in a condition and at liberty to elect whether they would or would not be bound, and so far as I have been able to learn its history, it never has been so applied. It has been directed exclusively to the relief of those who were already bound, and who could not but choose to abide the penalty. I have seen no case in which a stranger who was in a condition to make terms for himself, and demand any security he might require, has been protected by the principle."

In *Sanford* v. *McLean*, 3 Paige Ch. (N. Y.) 122, Chancellor WALWORTH states the principle with great clearness: "It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor as a matter of course without any agreement to that effect. In other cases the demand of a creditor, which is paid with

the money of a third person, and without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished:" see *In re Schaller*, 10 Daly (N. Y.) 57; *Clark* v. *Moore*, 76 Va. 262.

In *Childress* v. *Allen*, 3 La. R. 477, it is held that the purchaser of land seized and exposed to sale on an execution issued upon a judgment by which the debt is discharged, is not entitled to be subrogated to the rights of the judgment creditor. Such an act, said the court, cannot be distinguished from payment made to the creditors without a sale of the debtor's property, by a person not having an interest to discharge the debt. Subrogation does not arise in favor of a purchaser on a forced sale.

In the recent case of *Nash* v. *Taylor*, 83 Ind. 347, 351, an assessment was levied upon certain land for street improvements in favor of the contractor, who did the work on the street. The owner of the land borrowed the money from Nash with which to discharge the lien, which attached to his land by virtue of the levy. The money was used for this purpose; Nash sought to be subrogated to the rights of the contractor, which was denied. The court remarked, "Here there is nothing more than the loan of money by one neither in privity of blood nor of contract or estate, with the person who claims the lien which is sought to be displaced by the lender. There was no colorable obligation on the part of Nash to pay the street assessment, nor did he do so; neither did he intend to pay it. The case is, therefore, easily discriminated from one in which a party discharges a lien under a colorable obligation, or pays it, expecting to derive some benefit from it." See further, *Railroad* v. *Facney*, 78 Ill. 116; *Kelly* v. *Receiver of Green Bay, &c., Rd.*, 10 Biss. C. C. R. 151; *Duncan et al.* v. *Railroad*, 2 Wood C. C. 542; *Blair* v. *St. Louis H. & K. Rd.*, 23 Fed. Rep. 521; *Binford* v. *Adams*, 3 N. E. Rep. (S. C. Ind.) 753.

B. E. BLACK.

San Francisco, Cal.

Court of Errors and Appeals of Maryland.

PROVIDENCE WASHINGTON INS. CO. *v.* ADLER.

In marine insurance, if an article is injured by reason of its own inherent tendencies; as, for example, by spontaneous combustion, and these tendencies are not called into activity by any perils insured against, the insurer is not liable.

Whether the same rule applies in an ordinary contract of fire insurance, *quære.*

APPEAL from Superior Court, Baltimore city.

John R. Kenly, for appellant.

F. P. Clark, for appellee.

The opinion of the court was delivered by

STONE, J.—The plaintiffs shipped, by a line of steamers running from New York to the south, a quantity of oil-cloth clothing to Louisiana and Texas. They insured this clothing, before shipment, in the office of the defendant company. The clothing was packed in boxes, and on its arrival at its destination it was found injured and comparatively worthless, either by spontaneous combustion, or